

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 11, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2538

Cir. Ct. No. 2007CF405

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

RICHARD M. ARNOLD,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Winnebago County:
THOMAS J. GRITTON, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Richard Arnold appeals pro se from a circuit court order denying, without a hearing, his WIS. STAT. § 974.06 (2011-12)¹ motion seeking a new trial due to newly discovered evidence. Because the evidence Arnold offered did not constitute newly discovered evidence, we affirm.

¶2 In *State v. Arnold*, No. 2010AP1532-CR, unpublished slip op. (WI App Oct. 26, 2011), we affirmed the 2008 judgment convicting Arnold of repeated sexual assault of the same child after a jury trial. We also affirmed the order denying Arnold's WIS. STAT. RULE 809.30 postconviction motion seeking a new trial on the grounds of newly discovered evidence or in the interest of justice.

¶3 In September 2013, Arnold filed a pro se WIS. STAT. § 974.06 motion seeking a new trial on the grounds of newly discovered evidence because the victim had recanted his allegations against Arnold. Arnold offered the victim's November 2011 affidavit alleging that he fabricated his allegations. The circuit court denied the motion without hearing because the court addressed and rejected the same grounds at a June 2010 motion hearing.²

¶4 The circuit court has the discretion to deny a postconviction motion without a hearing if the motion is legally insufficient. *State v. Allen*, 2004 WI 106, ¶12, 274 Wis. 2d 568, 682 N.W.2d 433.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² Arnold contends that he did not present the same issues in his direct appeal and his September 2013 WIS. STAT. § 974.06 motion. We need not address this issue other than to say that if the circuit court's ground for denying's Arnold's § 974.06 motion was not entirely accurate, we may affirm the circuit court on other grounds. *State v. King*, 120 Wis. 2d 285, 292, 354 N.W.2d 742 (Ct. App. 1984).

The circuit court may deny a postconviction motion for a hearing if all the facts alleged in the motion, assuming them to be true, do not entitle the movant to relief; if one or more key factual allegations in the motion are conclusory; or if the record conclusively demonstrates that the movant is not entitled to relief.

Id. (footnote omitted). We may independently review the record to determine whether it provides a basis for the circuit court’s exercise of discretion. *State v. Pharr*, 115 Wis. 2d 334, 343, 340 N.W.2d 498 (1983).

¶5 The decision to deny a motion for a new trial due to newly discovered evidence is within the circuit court’s discretion. *State v. Avery*, 2013 WI 13, ¶22, 345 Wis. 2d 407, 826 N.W.2d 60. We review the circuit court’s decision for an erroneous exercise of discretion. *Id.*

¶6 A motion seeking a new trial due to newly discovered evidence must show that: (1) the evidence was discovered after the defendant’s conviction; (2) the defendant was not negligent in failing to discover the evidence before trial; (3) the evidence is material; and (4) “the evidence is not merely cumulative.” *Id.*, ¶25 (citation omitted).

¶7 We agree with the State that the victim’s recantation in his 2011 affidavit does not constitute newly discovered evidence. During his 2010 postconviction proceedings, Arnold argued that the victim was not credible at trial. The circuit court denied the postconviction motion noting that the victim’s credibility had been explored at trial. Two witnesses, Phillip Augsburger and Lila Behm, testified that the victim told them that the sexual assaults did not occur. We affirmed the circuit court, holding:

[The victim’s] testimony already was impeached in various ways. A friend of Arnold’s testified that [the victim] told him that he had fabricated the events because he was angry at [Arnold]; [the victim] conceded that he enjoyed spending

time with [Arnold] throughout this time period; and, although [the victim] testified he could recall nothing unusual about Arnold's genitalia, the defense introduced photographs showing several prominent piercings. We conclude that the trial court properly exercised its discretion when it denied Arnold's motion on the basis that the new evidence was merely cumulative to that introduced at trial.

Arnold, No. 2010AP1532-CR, unpublished slip op. at ¶16. Evidence that the victim fabricated his accusations was before the jury.

¶8 That Arnold's WIS. STAT. § 974.06 motion offered the victim's recantation in the form of an affidavit does not change the substance of the recantation or present a new challenge to the victim's credibility. The jury had the opportunity to judge evidence that the victim recanted to other persons prior to trial and was otherwise less than credible. The victim's affidavit offered the same type of evidence that was before the jury. Therefore, the victim's affidavit was cumulative evidence and could not constitute newly discovered evidence. *Avery*, 345 Wis. 2d 407, ¶25. Because the record shows that Arnold was not entitled to relief on his § 974.06 motion, the circuit court did not err in denying the motion without a hearing. *Allen*, 274 Wis. 2d 568, ¶12

¶9 In the absence of newly discovered evidence, there is no basis to order a new trial in the interest of justice or because the real controversy was not tried. *State v. Echols*, 152 Wis. 2d 725, 745, 449 N.W.2d 320 (Ct. App. 1989).

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

